85-850

Supreme Court, U.S.
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CASE NO._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GEORGE KIRK PURVIS and
BARBARA JEAN SOLOMOS, PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Filed November 18, 1985

QUESTIONS PRESENTED

1. Whether 14 U.S.C. §89(a) authorizes the Coast Guard to stop and seize United States vessels in international waters without any reason.

2. Whether allowing the Coast Guard to stop and board any United States vessel in international waters without any reason violates the fourth amendment prohibition against unreasonable seizure.

PARTIES

The parties to the proceedings im the Court whose judgment is sought to be reviiewed are as follows:

GEORGE KIRK PURVIS

BARBARA JEAN SOLOMOS

UNITED STATES DEPARTMENT OF JUSTICE

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Contents	iii
Table of Citations	v
Opinion Below	2
Jurisdiction	2
Relevant Statutory Provisions	2
Statement of Case	4
Reasons for Granting the Writ	10
I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL AS TO THE PROPER INTERPRETATION OF 14 U.S.C. §89(a) AND THE COAST GUARD'S AUTHORITY TO STOP AND SEIZE UNITED STATES VESSELS IN INTERNATIONAL WATERS.	10
II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE SCOPE OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEIZURE AS APPLIED TO COAST GUARD SEIZURES OF UNITED STATES VESSELS IN INTERNATIONAL WATERS.	23

Table of Contents, Cont'd.

	Page
Conclusion	27
Appendix	A-1 to A-14

TABLE OF CITATIONS

Cases Cited	Page
Almeida-Sanchez v. United States 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973)	24
Terry v. Ohio 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	15
United States v. Demanett 629 F.2d 862 (3d Cir. 1980)	25
United States v. Herrera 711 F.2d 1546 (11th Cir. 1983)	20, 22
United States v. Marino-Garcia 679 F.2d 1373 (11th Cir. 1982)	17
United States v. Maybusher 735 F.2d 366 (9th Cir. 1984)	12
United States v. Piner 608 F.2d 358 (9th Cir. 1979)	12-14
United States v. Pringle 751 F.2d 419 (1st Cir. 1985)	12, 15-16
United States v. Streifel 665 F.2d 414 (2d Cir. 1981)	12, 14-15
United States v. Villamonte-Marquez 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983)	21-22, 24

TABLE OF CITATIONS Cont'd.

Cases Cited Cont'd.	Page
United States v. Williams 617 F.2d 1063 (5th Cir. 1980) (en banc)	10-11, 17-18, 24
Wong Sun v. United States 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)	20
Other Authorities	
Amend. IV, U. S. Const.	23
14 U.S.C. §89	8
14 U.S.C. §89(a)	2-3, 7-8, 10-12, 14-19, 20 22-23, 27-28
19 U.S.C. §1581(a)	21
21 U.S.C. §955a(a)	4
28 U.S.C. §1254(1)	2
Rule 20, Rev. Rules of U.S.S.C.	2
Note, "High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea," 93 Harv. L. Rev. 725 (1980)	25

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The Petitioners, GEORGE KIRK PURVIS and BARBARA JEAN SOLOMOS, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit

entered in their case on August 14, 1985.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit, not yet reported, appears in the appendix hereto. No opinion was rendered by the District Court for the Southern District of Florida.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 14, 1985. The Eleventh Circuit denied a timely petition for rehearing on September 18, 1985, and this petition for a writ of certiorari was filed within sixty (60) days of that date as required by Rule 20 of the Revised Rules of the Supreme Court of the United States. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

14 U.S.C. §89(a). Law enforcement.

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to forfeiture, or so as to render such vessel liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

STATEMENT OF CASE

This petition arises from GEORGE KIRK PURVIS' and BARBARA JEAN SOLOMOS' convictions in the United States District Court for the Southern District of Florida for possession with intent to distribute marijuana in violation of 21 U.S.C. §955a(a). The issues raised in this petition relate solely to PURVIS' and SOLOMOS' motions to suppress evidence which were denied by the district court prior to their convictions.

The record of the hearing on the motions to suppress evidence reflects that the Government introduced the testimony of only two witnesses, Ensign Jeffrey William Baldwin and First Class Mate Bruce Alex Royce of the United States Coast Guard.

On the evening of June 14, 1984, Baldwin and Royce were on duty aboard the Coast Guard cutter Valiant. At approximately

midnight on June 14, 1984, Baldwin and Royce were awakened and designated as members of a boarding party to board the Pride, a 33-foot sailing vessel occupied by PURVIS and SOLOMOS. The testimony of Baldwin and Royce indicated that the decision to board the Pride was made by Commanding Officer Smith, who did not testify. The Government offered no reason as to why Commander Smith made the decision to seize the Pride and dispatch a boarding party. The Coast Guard stopped the Pride in international waters, approximately 100 miles north of the Yucatan Peninsula.

Before boarding the Pride, Baldwin received information from Lt. Wilkins that he had been in radio contact with an occupant aboard the Pride. Lt. Wilkins informed Baldwin that his first attempt to communicate with the Pride was unsuccessful. A second attempt was successful. Wilkins told Baldwin

that an occupant aboard the Pride said the vessel was bound from Cozumel to Alabama. Wilkins informed Baldwin that two United States citizens were on board the Pride, a man and a woman, and the vessel was registered in Beaumont, Texas.

An armed boarding party led by Baldwin was dispatched at approximately 1:00 a.m. on June 15, 1984. The boarding party circled the Pride before boarding. During this maneuver, Baldwin observed improper spacing of the state certificate numbers on the Pride's hull. Royce testified that he also noticed the misspaced numbers, and that this constituted a violation of federal law. Royce detected the odor of marijuana as the boarding party came along the Pride's side. After boarding the Pride, Baldwin and Royce observed bales of marijuana through the open door in the cabin. Royce discovered mattresses and

other personal belongings owned by PURVIS and SOLOMOS on top of the bales in the cabin area. The bales were tested and the results were positive for marijuana. PURVIS and SOLOMOS were arrested and transported to the Valiant.

On cross-examination, Baldwin and Royce admitted that they first detected the misspaced registration numbers and odor of marijuana after the Pride had been seized and while the boarding party circled the Pride. Baldwin and Royce did not know whether other officers aboard the Valiant were aware of the misspaced numbers or presence of marijuana on the Pride. Baldwin did not indicate in his testimony that he boarded the Pride for the purpose of conducting a document and safety inspection under §89(a). Royce testified that the purpose of boarding the Pride was "not necessarily" to conduct a document and safety inspection.

At the conclusion of the suppression hearing, the district court announced its ruling on the motions to suppress in open court. The court ruled that the Coast Guard's stop and boarding of the Pride was authorized by 14 U.S.C. §89 and other information obtained by the boarding party. Subsequently, the defendants were convicted and sentenced to thirty months, followed by a special parole term of three years upon the expiration of the initial sentence.

The conviction was appealed to the Eleventh Circuit on the suppression issue. The court affirmed PURVIS' and SOLOMOS' conviction. The court ruled that the Coast Guard has the power under 14 U.S.C. §89(a) to stop and board any American vessel anywhere on the high seas in the complete absence of suspicion of criminal activity. Therefore, since the Pride was of United States registry and was

stopped while in international waters, the court held that the initial seizure and boarding of the vessel was reasonable within the meaning of the fourth amendment.

The Eleventh Circuit denied PURVIS' and SOLOMOS' timely petition for rehearing and suggestion for rehearing en banc without opinion on September 18, 1985. These issues are now presented for this Court's review.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF 14 U.S.C. §89(a) AND THE COAST GUARD'S AUTHORITY TO STOP AND SEIZE UNITED STATES VESSELS IN INTERNATIONAL WATERS.

Federal statute, 14 U.S.C. §89(a), provides that:

> The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.

Construing this language, the Eleventh Circuit held, citing United States v. Williams, 617 F.2d 1063, 1075 (5th Cir. 1980)

(en banc), that, "[u]nder the law of this circuit, the Coast Guard has the power under 14 U.S.C. §89(a) to 'stop and board any American flag vessel anywhere on the high seas in the complete absence of suspicion of criminal activity.'" However, the court misconstrued Williams as eliminating the necessity for some reason for a valid Coast Guard seizure. The Eleventh Circuit held, "[s]ince it is undisputed that appellants' vessel was of United States registry and was stopped while in international waters, the Appellants have no cause to complain of the initial seizure and boarding of the vessel."

This ruling directly conflicts with the Ninth Circuit's analysis in United States

v. Piner, 608 F.2d 358 (9th Cir. 1979),[1] the Second Circuit's decision in United States v. Streifel, 665 F.2d 414, 423 (2d Cir. 1981), and the First Circuit's holding in United States v. Pringle, 751 F.2d 419 (1st Cir. 1985). These circuits hold that §89(a) requires the Coast Guard to have a reasonable suspicion before it can validly seize a vessel on the high seas.

In Piner, the Coast Guard boarded a boat in San Francisco Bay, at night, for a routine document and safety inspection, without warrant and without probable cause to believe or form a suspicion that a violation of the law had occurred. The court held that the

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[1] See also United States v. Maybusher, 735 F.2d 366, 371 (9th Cir. 1984) ("To justify the stop of the Red Baron under the Fourth Amendment, the officers must have had a founded suspicion of criminal conduct.")

random stopping of the vessel by the Coast Guard after dark was unreasonable when the Coast Guard had no cause to suspect noncompliance with safety regulations or registration requirements. United States v. Piner, 608 F.2d at 361. Affirming the district court order suppressing the marijuana seized by the Coast Guard, the Ninth Circuit stated:

> We conclude that the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance is not justified by the governmental need to enforce compliance with safety regulations and constitutes a violation of the fourth amendment. A stop and boarding after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncompliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer.
>
> Id.

The facts of the instant case are almost identical to those of Piner. The only fact which

distinguishes the two is the testimony of First Class Mate Royce that the purpose of boarding the Pride was not necessarily to conduct a document and safety inspection. The record contains no objective facts known to the Coast Guard prior to the seizure which authorized the action taken. In the absence of articulable, objective facts, the seizure and subsequent boarding of the Pride was unauthorized by §89(a). Nevertheless, the Eleventh Circuit, in direct conflict with Piner, ruled that neither suspicion nor any reason was required to authorize the initial seizure of the Pride under §89(a).

In Streifel, the Second Circuit held that an officer having a reasonable suspicion, based on articulable, objective facts that criminal activity is afoot, may make an investigatory stop that is reasonable in both its duration and its intrusiveness. Adopting the

rationale of Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), the court stated:

> We believe these principles are as applicable to searches and seizures on the high seas as they are to searches and seizures on the land. Assuming, as we do, the truth of the fundamental proposition that the Fourth Amendment itself applies to searches and seizures by government agents at sea, ... we see no reason to suppose that the portion of Fourth Amendment jurisprudence that governs the validity of investigatory stops, developed in land based cases, is not also applicable at sea.

Again, however, the Eleventh Circuit's decision in the instant case conflicts with the Second Circuit's rationale in Streifel.

The First Circuit has also adopted the reasonable and articulable suspicion standard when evaluating whether Coast Guard seizures are authorized under §89(a). United States v. Pringle, 751 F.2d 419 (1st Cir. 1985). In Pringle, the defendants challenged the stop,

boarding, search and seizure of the vessel Nirvana. The court found that the Coast Guard's action was authorized under §89(a) because:

> [T]here was reasonable and articulable grounds here for suspecting that the Nirvana was engaged in criminal activity: she was flying no flag; she had an easily removable nameplate; and she appeared to be riding low in the water.
>
> Id. at 424.

The court then noted that:

> We have not factored into the grounds for suspecting criminal activity the fact that the Nirvana's announced destination was inconsistent with the course she had been following because this did not become known to the Coast Guard until after the order to stop for boarding was given.
>
> Id. at 424, n. 3 (emphasis added).

Although the Pringle court's analysis is applicable to the instant case, the Eleventh Circuit has chosen to ignore it in favor of

its own standard for valid Coast Guard seizures under §89(a).

Additionally, the Eleventh Circuit's decision in the instant case conflicts with its own prior decisions. Although the Eleventh Circuit and its predecessor, the Fifth Circuit, have expressly rejected other circuits' requirement that the Coast Guard have a reasonable suspicion before it can validly seize a vessel on the high seas, in its place, the Eleventh Circuit has required as a constitutional minimum that the Coast Guard have an articulable reason before it seizes a vessel on the high seas. United States v. Williams, 617 F.2d 1073, 1075 (5th Cir. 1980) (en banc); United States v. Marino-Garcia, 679 F.2d 1373, 1385 (11th Cir. 1982).

As the Fifth Circuit noted in Williams, the Coast Guard's source of authority for the seizure in the instant case,

§89(a), "requires that the Coast Guard have a reasonable suspicion that the vessel is engaged ... in drug smuggling or some other activity making it subject to the operation of the laws of the United States." Williams, 617 F.2d at 1083. Although this is admittedly a minimal requirement in terms of the burden it places on the Government, the record in the instant case is absolutely void of any testimony or evidence as to the Coast Guard's reason for its initial seizure of the Pride.[2] Commander Smith, who was in charge of the cutter Valiant when the Pride was seized, did not testify, and the Government never established his reasons for deciding to stop the Pride and

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[2] The Petitioners concede that after the initial seizure of the Pride the odor of marijuana, in combination with the plain view doctrine, would be enough to justify the subsequent search if the initial seizure had been valid.

send a boarding party. Ensign Baldwin, who headed the boarding party, admitted that even if the numbers had not been misspaced he would have boarded the Pride. Nor were the misspaced numbers known to the Coast Guard when the decision to seize the Pride was made. This testimony weakens considerably the possibility that the reason for the seizure was to conduct a document or safety inspection. Further, Ensign Baldwin's testimony is verified by the Government's other key witness, First Class Mate Royce, who testified that the purpose of boarding the Pride was "not necessarily" to conduct a document and safety inspection. The testimony further indicates that the odor of marijuana was not detected until well after the seizure of the Pride. Because the Government produced no evidence or testimony as to Commander Smith's basis for seizing the Pride, the seizure was illegal, and evi-

dence obtained from all searches subsequent to an illegal seizure must be suppressed under the "fruit of the poisonous tree" doctrine. Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

The instant case most clearly lends itself to the logic applied by the Eleventh Circuit in resolving United States v. Herrera, 711 F.2d 1546 (11th Cir. 1983). In Herrera, defendants moved to suppress evidence obtained in a search and seizure by customs officers under a customs statute analogous to

§89(a).[3] The court distinguished the United States Supreme Court's holding in United States v. Villamonte-Marquez, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983), that no suspicion is necessary to stop and board a vessel located in waters providing ready access to the open sea to conduct a document inspection. The Supreme Court also made it clear in Villamonte-Marquez that customs officers are not precluded from using document

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[3] 19 U.S.C. §1581(a) provides in pertinent part:

> Any officer of the customs may at any time go on board of any vessel or vehicle at any place in the United States or within the customs waters ... and examine the manifest and other documents and papers and examine, inspect, and search the vessel or vehicle and ... any person, trunk, package, or cargo on board, and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel compliance.

check authority simply because they suspect drug smuggling or other illegal activity on board. 462 U.S. at 584, n. 3, 103 S.Ct. at 2577, n. 3. But, as the Eleventh Circuit noted in Herrera:

> [N]othing in that opinion [Villamonte-Marquez] suggests that reasonable suspicion is not required when the customs officers' conduct, objectively assessed, indicates they did not stop and board the vessel to make a document inspection.
>
> Herrera, 711 F.2d at 1554, n. 13.

The record in the case at bar contains no evidence or testimony that the Coast Guard had any reason to seize the Pride before it did so.

Therefore, the opinion below dispenses with the requirement that the Coast Guard have a reasonably articulable suspicion to conduct valid searches or seizures on the high seas under 14 U.S.C. §89(a) and thus creates a

split between the circuits.

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE SCOPE OF THE FOURTH AMENDMENT PROHIBITION AGAINST UNREASONABLE SEIZURE AS APPLIED TO COAST GUARD SEIZURES OF UNITED STATES VESSELS IN INTERNATIONAL WATERS.

The Eleventh Circuit affirmed the trial court's ruling that the Coast Guard's initial seizure of the sailing vessel Pride was proper under the most liberal interpretation of 14 U.S.C. §89(a). That statute provides in pertinent part that the Coast Guard:

> ... may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance.
>
> 14 U.S.C. §89(a).

However, the Eleventh Circuit's interpretation of §89(a) ignores the well-established

and imminently sensible rule that "no Act of Congress can authorize a violation of the Constitution." Almeida-Sanchez v. United States, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973). Therefore, it is clear that the fourth amendment regulates Coast Guard seizures. United States v. Villamonte-Marquez, 462 U.S. 579, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983). It is equally clear that even the mere stopping of a vessel, without a boarding, is a fourth amendment "seizure" since the governmental action restrains the vessel's freedom to proceed. United States v. Williams, 617 F.2d 1063, 1071 (5th Cir. 1980) (en banc).

Under the dictates of the fourth amendment, a seizure can only be held reasonable when the governmental interests protected outweigh the private interests adversely affected. Id. at 1083. In the case at bar, the

Eleventh Circuit has not balanced the governmental versus private interests. If the only criteria for a valid Coast Guard seizure are a vessel's United States registry and its travel on international waters, then literally every United States boat which ventures beyond the three-mile territorial limit is subject to seizure. Such a standard is overreaching because it gives the Coast Guard unbridled discretion to seize any United States vessel in "international" waters without regard to the objective reasonableness constitutionally required for such a seizure.[4] Indeed, the standard adopted by the Eleventh Circuit makes

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[4] As the Third Circuit has noted, "certainly, there are alternatives, other than unbridled discretion." United States v. Demanett, 629 F.2d 862, 868 (3d Cir. 1980). For a discussion of some of these alternatives, see Note, "High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea," 93 Harv. L. Rev. 725, 743-48 (1980).

it legally impossible for the Coast Guard to conduct an unreasonable seizure of a United States vessel in international waters. Surely, this result cannot be approved by this Court in complete disregard of the prohibition on Acts of Congress authorizing violations of the constitution. Therefore, the Court should grant the writ of certiorari to review the opinion below.

C O N C L U S I O N

The Eleventh Circuit's opinion directly conflicts with other circuits' rulings requiring the Coast Guard to have a reasonable suspicion before invalidly seizing a vessel on the high seas. The opinion below expands the Coast Guard's authority under 14 U.S.C. §89(a) to include seizures of United States vessels in international waters without any reason. This expansion is far beyond the bounds anticipated by Congress, the courts and the constitution.

The standard adopted by the Eleventh Circuit makes it legally impossible for the Coast Guard to conduct an unreasonable seizure of a United States vessel in international waters. The opinion fundamentally alters the nature of search and seizure law on the high seas. The Eleventh Circuit's radical departure from established and time-tested princi-

ples of search and seizure law creates severe practical problems for law enforcement agencies forced to determine the proper scope of their authority under §89(a) and impinges upon various constitutional protections applicable to United States citizens on the high seas.

This Court's intervention is necessary to guide the various circuits concerning the proper interpretation of 14 U.S.C. 89(a) and to enforce the fourth amendment prohibition against unreasonable seizure as applied to Coast Guard seizures of United States vessels in international waters.

For the reasons stated herein, this Court should grant a writ of certiorari to

review the opinion below.

Respectfully submitted,

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Filed November 18, 1985

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October Term, 1985

GEORGE KIRK PURVIS and
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A P P E N D I X
TO
PETITION FOR A WRIT OF CERTIORARI

I N D E X

	Page
Opinion of the Court of Appeals for the Eleventh Circuit, Tjoflat, Hill and Anderson, Circuit Judges	A-1
Order of the Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing	A-13

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5876

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE KIRK PURVIS and
BARBARA JEAN SOLOMOS,

Defendants-Appellants.

Appeal From the United States
District Court
for the Middle District of Florida

August 14, 1985

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

Appellants were convicted of possession with intent to distribute marijuana under 21 U.S.C.A. §955a(a), after the Coast Guard discovered approximately 3,300 pounds of marijuana on the vessel in which they were traveling. Appellants appeal their convictions on two grounds: (1) that the search and seizure of the vessel exceeded the Coast Guard's statutory authority and was unconstitutional and, thus, the marijuana seized by the Coast Guard should have been suppressed at trial; and (2) that the government's alleged failure to comply with Fed.R.Crim.P. 5(a) requires that the indictments against appellants be dismissed. We agree with the district court's decisions both with respect to the motion to suppress and Rule 5(a) motion. Therefore, we

affirm the convictions.

A. SEARCH AND SEIZURE

Under the law of this circuit, the Coast Guard has the power under 14 U.S.C.A. §89(a) to "stop and board any American flag vessel anywhere on the high seas in the complete absence of suspicion of criminal activity." United States v. Williams, 617 F.2d 1063, 1075 (5th Cir. 1980) (en banc) (indicating that §89(a) has been held constitutional);[1] see also, United States v. Kubiak, 704 F.2d 1545, 1547 (11th Cir.), cert. denied, ___ U.S. ___, 104 S.Ct. 163, 78 L.Ed.2d 149 (1983); United States v. Marino-Garcia, 679 F.2d 1373, 1385 (11th Cir. 1982), cert.

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[1] In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), this court adopted as binding precedent all of the decision of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. Id. at 1209.

denied sub nom., Pauth-Arzuza v. United States, 459 U.S. 1114, 103 S.Ct. 748, 74 L.Ed.2d 967 (1983). Since it is undisputed that appellants' vessel was of United States registry and was stopped while in international waters, the appellants have no cause to complain of the initial seizure and boarding of the vessel. We also find that the search conducted by the Coast Guard was reasonable within the meaning of the Fourth Amendment. Based on the uncontradicted testimony of Coast Guard First Mate Royce, the district court found as fact that from where Royce stood immediately after boarding the bales of what appeared to be (and later proved to be) marijuana could be seen in the vessel's cabin through an open door. Thus, the search was reasonable because the marijuana was in Royce's plain view from the vantage point in which Royce was "lawfully entitled to be."

United States v. Arrendendo-Hernandez, 574 F.2d 1312, 1314 (5th Cir. 1978); see Coolidge v. New Hampshire, 403 U.S. 443, 464-72, 91 S.Ct. 2022, 2037-41, 29 L.Ed.2d 564 (1971) (explaining plain view doctrine). The fact that Royce used a flashlight to see into the open cabin does not undermine the government's reliance on the plain view doctrine. Arrendendo-Hernandez, 574 F.2d at 1315 ("In an insufficiently lit area, the use, by an officer, of a flashlight to aid his vision does not tranform an otherwise justifiably plain view observation into an illegal search").

Therefore, the search and seizure of the vessel in this case was statutorily authorized and constitutionally legitimate.

B. FEDERAL RULE OF CRIMINAL PROCEDURE 5(a)

Under Fed.R.Crim.P. 5(a) "an [o]fficer making an arrest ... without a warrant shall take the arrested person without unnec-

essary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state or local judicial officer...." Appellants argue that the alleged violation of Rule 5(a) required the district court to dismiss their indictments. We need not decide whether dismissal of the indictments would be an appropriate remedy if there had been an "unreasonable delay" within the meaning of Rule 5(a). See Mallory v. United States, 354 U.S. 449, 451-54, 77 S.Ct. 1356, 1357-59, 1 L.Ed.2d 1479 (1957) (indicating that the purpose of Rule 5(a) is to prevent oppressive police interrogations and other "third-degree" tactics before bringing the accused in front of an officer of the court; the remedy was the exclusion of evidence which had been gained during the delay by the use of such tactics); McNabb v. United States, 318 U.S. 332, 345, 63

S.Ct. 608, 615, 87 L.Ed. 819 (1943) ("to permit such evidence to be made the basis of a conviction in the Federal courts would stultify the policy which Congress has enacted into law"); United States v. Mendoza, 473 F.2d 697, 702 (5th Cir. 1973) ("a violation of the rule renders the evidence obtained per se inadmissible"). Under the facts and circumstances of this case, we find that there was no "unnecessary delay."

Five days elapsed from the time appellants were arrested at sea until they were brought in front of a federal magistrate. After the arrests, the Coast Guard cutter did not proceed directly to Key West, Florida, the nearest United States port, but rather continued its normal law enforcement patrolling activities. In addition, the vessel stopped for approximately eight hours to attempt to sink an abandoned vessel.

Approximately three days after the arrests, the Coast Guard cutter was met by a Coast Guard patrol boat and appellants were transferred to a patrol boat. The patrol boat then transported appellants to Key West, arriving there one day later or approximately four days after the arrests had been made. They arrived in the late afternoon and the federal magistrate was out of town. They spent that night in jail and were arraigned the next day at approximately two o'clock in the afternoon.

In determining whether there has been a Rule 5(a) violation, we must naturally look at the reasons for the delay. Evidence taken in the district court indicates that appellants were arrested on the high seas approximately 350 miles from Key West and that even if appellants had been brought directly by ship from the point of arrest to Key West, the

trip would have taken between 35 and 72 hours.[2] Therefore, a large part of the delay was necessitated by the fact that the arrest was made so far from port on the high seas. Moreover, the delay of less than one day after arriving at Key West was reasonable because of the magistrate's brief absence.

Our resolution of this case is guided by the former Fifth Circuit's decision in United States v. Odom, 526 F.2d 339, 342-43 (5th Cir. 1976). In Odom, the appellant was arrested 200 miles from the nearest United States territory. Id. at 343. There is no indication in Odom that the Coast Guard cutter

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[2] There was a considerable discrepancy in the testimony concerning how long it would have taken the Coast Guard cutter to proceed directly from the point of arrest to Key West. There was testimony to the effect that the Coast Guard cutter's speed was considerably diminished because it had appellants' marijuana-laden vessel in tow.

transporting Odom was in any way delayed by emergencies or other exigent circumstances. Nevertheless, the court held that a five-day delay from time of arrest to time of arraignment was not "unnecessary delay."

Moreover, Odom indicates that whether the defendant was mistreated or improperly interrogated should enter into the analysis. Id. at 342. The evidence in this case indicates that appellants were not mistreated during the five-day period. While on board the Coast Guard cutter, they were kept handcuffed in a semi-sheltered area on the deck of the Coast Guard vessel. The arrests took place during June and there is no indication that the weather was cold or otherwise inclement. Moreover, appellants were fed regularly, given mattresses on which to sleep, and had access to bathrooms. In addition, there is no evidence that there were any improper or coercive

interrogations in this case. Appellants were read their rights and interrogated by Coast Guard authorities at some point after the arrests. However, appellants do not press any claims concerning the interrogation. Clearly, the results of any interrogation that may have occurred did not bolster the government's case, which was based solely on the observations made by the Coast Guard authorities who boarded the vessel and on the seizure of the marijuana. Compare Odom, 526 F.2d at 343 (incriminating statements were not the product of improper interrogation or coercion during the five-day delay); see also United States v. Mendoza, 473 F.2d 697, 702 (5th Cir. 1973) (purpose of Rule 5(a) "is to have a judicial officer advise the defendant of his constitutional rights and thereby to prevent administrative detection without probable cause and to reduce the opportunity for third-degree

practices").

On the authority of Odom and under the particular facts and circumstances of this case, we conclude that there was no "unnecessary delay" under Rule 5(a).

CONCLUSION

In light of the foregoing, appellants' convictions are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-5876

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GEORGE KIRK PURVIS and
BARBARA JEAN SOLOMOS,

Defendant-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

Supreme Court, U.S.
FILED
JAN 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-850 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE KIRK PURVIS AND
BARBARA JEAN SOLOMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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9pp

TABLE OF AUTHORITIES

Page

Cases:

Delaware v. *Prouse*, 440 U.S. 648 4

Maryland v. *Macon*, No. 84-778 (June 18, 1985) 4

United States v. *Arra*, 630 F.2d 836 5

United States v. *Cilley*, No. 84-5199 (9th Cir. Dec. 20, 1985) 4

United States v. *Eagon*, 707 F.2d 362, cert. denied, 464 U.S. 991 4

United States v. *Green*, 671 F.2d 46, cert. denied, 457 U.S. 1135 3

United States v. *Piner*, 608 F.2d 358 4

United States v. *Pinto-Mejia*, 720 F.2d 248, modified on rehearing, 728 F.2d 142 5

United States v. *Pringle*, 751 F.2d 419 ..... 4, 5

United States v. *Streiful*, 665 F.2d 414 4

United States v. *Villamonte-Marquez*, 462 U.S. 579 ..... 3, 4

United States v. *Watson*, 678 F.2d 765, cert. denied, 459 U.S. 1038 ..... 3, 4

Constitution and statutes:

U.S. Const. Amend. IV 1, 3, 4

14 U.S.C. 89(a) 3, 5

19 U.S.C. 1581(a) 3

21 U.S.C. 955a(a) 1

In the Supreme Court of the United States

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GEORGE KIRK PURVIS AND
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the stopping and boarding of their vessel on the high seas by Coast Guard officers violated the Fourth Amendment.

1. After waiving their right to a jury and consenting to trial on the record of the previously-held suppression hearing, petitioners were convicted in the United States District Court for the Southern District of Florida of possessing marijuana with intent to distribute while aboard a United States vessel on the high seas, in violation of 21 U.S.C. 955a(a). Pet. App. 1-2. Each petitioner was sentenced to 30 months' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. 1-12).

During the early morning hours of June 15, 1984, the Coast Guard cutter *Valiant* came upon the United States flag vessel *Pride* on the high seas in the Yucatan Channel approximately 100 miles north of the Yucatan Peninsula (Tr. 7-8).[1] The *Valiant* attempted to communicate with the *Pride* by radio but received no response (Tr. 10). Later, an individual aboard the *Pride* returned the Coast Guard's transmissions and informed the Coast Guard that the *Pride's* homeport was Beaumont, Texas, and that the vessel was sailing from Cozumel, Mexico, to Alabama (Tr. 8).

At approximately 1:00 a.m., a boarding party was dispatched from the *Valiant* to conduct a document and safety inspection and to determine if the *Pride* was in compliance with all applicable federal laws (Tr. 101). While the *Valiant* initially circled the *Pride*, the Coast Guard boarding party noticed that the *Pride's* registration numbers were improperly displayed (Tr. 13-14, 88). As the boarding party came directly alongside the *Pride*, the officers detected a strong odor of marijuana (Tr. 88). Once aboard the vessel, the Coast Guard officers observed in plain view green plastic-wrapped bales of marijuana stacked about four feet high (Tr. 89-90).

Petitioner Purvis identified himself to the boarding party as the *Pride's* captain and produced the vessel's documentation, which indicated that the vessel was registered in Texas (Tr. 24). After petitioners were arrested, the boarding party completed the safety and documentation check throughout the communal and working areas of the *Pride* (Tr. 28, 101-102). During the course of the inspection, the officers found additional marijuana hidden under the seats in the cockpit (Tr. 21).

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[1] "Tr." refers to the transcript of the suppression hearing, contained in Volume III of the Record on Appeal.

2. Petitioners contend that the stopping and boarding of the *Pride* violated the Fourth Amendment because the Coast Guard lacked probable cause or a reasonable suspicion of ongoing criminal activity.[2] However, the decision of the court of appeals is correct, there is no conflict among the circuits on this issue, and this Court has consistently denied petitions presenting the issue raised here. See, *e.g.*, *United States* v. *Watson*, 678 F.2d 765 (9th Cir.), cert. denied, 459 U.S. 1038 (1982); *United States* v. *Green*, 671 F.2d 46 (1st Cir.), cert. denied, 457 U.S. 1135 (1982). Accordingly, review by this Court is unwarranted.

Under 14 U.S.C. 89(a), the Coast Guard "may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance." The stop and boarding in this case was fully authorized by that statute. The *Pride* was registered in the United States (Pet. App. 4), and, contrary to petitioners' claim (Pet. 7, 18-19), the evidence indicated that the stopping and boarding was conducted for the purpose of determining if the *Pride* was in compliance with all applicable federal laws, including those pertaining to documentation and safety. Petty Officer Royce, a member of the boarding party, offered undisputed testimony to that effect (Tr. 101). Moreover, in *United States* v. *Villamonte-Marquez*, 462 U.S. 579 (1983), this Court held that Customs officials may board a vessel on inland waters under a similar provision, 19 U.S.C. 1581(a), without any suspicion of wrongdoing in order to conduct a document inspection and also ruled that such a boarding is

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[2]Petitioners concede (Pet. 18 n.2) that the marijuana found aboard the *Pride* was lawfully seized if the initial stop and boarding were proper.

reasonable under the Fourth Amendment. The decision in *Villamonte-Marquez* clearly dooms petitioners' claim here.[3]

Petitioners erroneously assert (Pet. 11-14) that the court of appeals' decision conflicts with *United States* v. *Piner*, 608 F.2d 358 (9th Cir. 1979). In *Piner*, the court held that the suspicionless boarding of a vessel for the purpose of conducting a safety and documentation check could be conducted only during daylight hours. But see *United States* v. *Eagon*, 707 F.2d 362, 364-365 (9th Cir. 1982), cert. denied, 464 U.S. 991 (1983) (upholding suspicionless night-time boarding of vessel, pursuant to administrative plan, for safety and documentation check); *United States* v. *Watson, supra* (same). However, *Piner* was decided before *Villamonte-Marquez* and relied upon decisions involving automobile stops, such as *Delaware* v. *Prouse*, 440 U.S. 648 (1979). See 608 F.2d at 361. *Villamonte-Marquez* rejected the analogy to those cases (see 462 U.S. at 588-589), and the Ninth Circuit has since ruled that the Coast Guard may stop and board vessels on the high seas in the absence of any suspicion of criminal activity for the purpose of conducting a document or safety inspection. See *United States* v. *Cilley*, No. 84-5199 (9th Cir. Dec. 20, 1985), slip op. 6-11.[4]

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[3]It is immaterial that the officers may have stopped the vessel in part because they suspected drug smuggling, so long as they were entitled to conduct a documentation and safety check and did not act in excess of that authority until justified in doing so. See *Villamonte-Marquez*, 462 U.S. at 584 n.3; see also *Maryland* v. *Macon*, No. 84-778 (June 17, 1985), slip op. 7.

[4]Nor does the court of appeals' decision here conflict with *United States* v. *Streifel*, 665 F.2d 414 (2d Cir. 1981), or *United States* v. *Pringle*, 751 F.2d 419 (1st Cir. 1984). *Streifel* was decided prior to *Villamonte-Marquez*, and the court upheld the stop and boarding of a vessel on the ground that there was a reasonable suspicion of ongoing criminal activity. 665 F.2d at 424-425. Although, the court stated that the Coast Guard must have a reasonable suspicion before stopping and

Moreover, at the time the Coast Guard officers in this case actually boarded the *Pride*, they had a reasonable suspicion that it held narcotics and that federal navigation laws were also being violated. The record shows that, upon circling and approaching the *Pride*, the members of the boarding party noticed that its registration numbers were improperly displayed, and one member detected a strong odor of marijuana (Tr. 13, 88). Accordingly, even if the initial stop could not be justified on this basis and can be justified only on the basis of 14 U.S.C. 89(a), the actual boarding of the vessel was justified on the basis of a reasonable suspicion.

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boarding a vessel to conduct a search for narcotics (*id.* at 419-423), the court expressly reserved the issue of whether such a suspicion is also necessary to conduct an administrative search, such as a safety and documentation check (*id.* at 420 n.8). Accordingly, *Streifel* did not resolve the issue presented here. The Second Circuit has also not decided this question since *Streifel*. See *United States* v. *Pinto-Mejia*, 720 F.2d 248, 262 (1983), modified on rehearing, 728 F.2d 142 (2d Cir. 1984) (stop and boarding justified on the basis of a reasonable suspicion). In *Pringle*, the court stated in dictum that a reasonable suspicion is necessary to stop and board a vessel in order to investigate criminal activity, but the court held that the Coast Guard may stop and board a vessel under 14 U.S.C. 89(a) in the absence of any suspicion of criminal conduct in order to conduct a safety and document inspection (751 F.2d at 424). Accord *United States* v. *Arra*, 630 F.2d 836, 841-842 (1st Cir. 1980).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1986